IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.1133 OF 2004

Jugamander Rameshwardas Agarwal ...Petitioner

v/s.

Shri Vithal Bajaba Tapkir
and ors. ...Respondents

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Mr.A.M. Joshi for the Petitioner.

Mr.Bharat Joshi i/b S.R.Ganbavale for Respondents Nos. 16 & 17.

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CORAM: D.K.DESHMUKH, J.

DATED: 5th October,2005

P.C.:

1. By this petition the Petitioner challenges the order dated 27-8-2003 and the order dated 3-1-2001 passed by the trial court.

2. The facts which are necessary to be stated for deciding this petition are that the present Petitioner along with two persons by name Krishna and Ramesh filed Spl.Civil Suit No.531 of 1990 before the Civil Judge, Sr.Division, Pune. The Petitioner was shown as Plaintiff No.2. In that suit a decree for specific performance of the agreement dated 29-8-1988 was prayed for. To the suit Defendants Nos. 1 to 14 were joined as vendors, who had entered into an agreement to sell the property to the three

Plaintiffs. During the pendency of this civil suit, one Subhash Nelge filed an application before the Court for being joined as a Defendant in the suit. His application was that the present Petitioner who was Plaintiff No.2 in the suit has entered into a deed with him and has transferred his own rights as also the rights of other two Plaintiffs in his favour and therefore, he should be joined as Defendant in the suit. The Petitioner has stated in the petition that the court called for say from the other parties to the suit. There is no averments in the petition that the present Petitioner filed his say and opposed the application. That application was granted by the court by order dated 3-1-2001. It appears from the record, that is available, that neither the Plaintiff No.2/ present Petitioner opposed the application nor did he think it necessary to challenge the order dated 3-1-2001. Mr. Subhash Nelge was joined as Defendant No.15 to the suit. He also filed his written statement. In this background, Plaintiffs Nos. 1 & 3 submitted an application to the court for transposition of Plaintiff No.2 as Defendant No.16. According to the Plaintiffs Nos. 1 & 3, the Plaintiff No.2/ the present Petitioner has entered into a deed with the Defendant No.15 and has transferred not only his rights in the property acquired by virtue of the agreement in favour of Defendant No.15, but has also stated that he is transferring their rights. According to the Plaintiffs Nos. 1 & 3, therefore, it would be

embarrassing for them to prosecute the suit having Plaintiff No.2/ present Petitioner as the Plaintiff. The present Petitioner filed his reply to that application. What is significant is that though in the application filed by the Plaintiffs Nos. 1 & 3 there was a specific averment made that the present Petitioner has transferred his interest acquired because of the agreement in relation to the property in favour of the Defendant No.15, the Petitioner by his reply did not deny the fact. The trial court decided the application by its order dated 28-7-2003. The court while deciding the application perused various deeds executed by the Petitioner in favour of Defendant No.15 and on finding that the Plaintiff No.2 has transferred his rights in favour of the Defendant No.15 has granted the application filed by the Plaintiffs Nos. 1 & 3 and directed transposition of the Petitioner as Defendant No.16. The Petitioner challenges this order also in this petition.

3. So far as challenge to the order dated 28-7-2003 is concerned, the learned Counsel appearing for the Petitioner submits that he has not transferred his rights in favour of the Defendant No.15 and therefore he cannot be transposed as Defendant. In my opinion, the submission is devoid of any substance. Because, the Defendant No.15 asserted that the Petitioner has transferred his rights in favour of Defendant No.15 , in his application filed for being joined as the Defendant. At that time, the Petitioner did not deny

those averments. The same averments were made by the Plaintiffs Nos. 1 & 3 in their application. The present Petitioner did file his reply to that application, but again did not deny that he has transferred his rights in favour of Defendant No.15. In my opinion, therefore, as it is clear from the record that the present Petitioner has transferred his rights in favour of Defendant No.15 and he has also tried to transfer the rights of Plaintiffs Nos. 1 & 3 in favour of Defendant No.15, it will be embarrassing for the Plaintiffs Nos. 1 & 3 to prosecute the suit having the present Petitioner as Plaintiff, and therefore, in my opinion, the order impugned dated 28-7-2003 is perfectly in accordance with law and it can not be successfully challenged. It is further pertinent to note that though it appears that initially the Defendant No.15 had not produced the document alleged to have been executed by the present Petitioner in his favour, it appears that subsequently those documents were produced, which have been perused by the court while making the order dated 28-7-2003.

4. Perusal of the prayer clause of the petition shows that the Petitioner is also challenging the order dated 3-1-2001. The learned Counsel appearing for the Petitioner relies on the judgment of Supreme Court in the case of Kasturi v/s. Iyyamperumal and ors., 2005 (3) Mh.L.J. 1. In my opinion, however, there are two bars for the Petitioner to challenge

the order dated 3-1-2001. First bar is, the application on which that order was made was not opposed by the present Petitioner, though he has averred in the petition that the court had called the parties to submit their reply. He does not say in the petition that he has filed his reply and opposed the application. The order passed by the Court on the application suggests that that application was not opposed by the present Petitioner. Not having opposed the application on which the order dated 3-1-2001 was passed, the Petitioner cannot be permitted to challenge the order. Secondly, the order was passed in the month of January, 2001. No acceptable reason has been given for not challenging that order at an earlier point of time and therefore, the petition of the Petition so far as the order dated 3-1-2001 is concerned, suffers from latches on the part of the Petitioner.

5. Taking overall view of the matter, therefore, it is apparent that the Petitioner was not at all justified in filing this petition. The Petition, therefore, is liable to be rejected. Petition is accordingly rejected. Petitioner is directed to pay as and by way of costs Rs.5,000/- to the Respondents Nos. 16 & 17.

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